No. 96-1243

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ROBERT CARLEN, M.D.,

Petitioner,

vs.

DEPARTMENT OF HEALTH SERVICES, DAVID HARRIS, M.D., Individually and as former Commissioner of the Suffolk County Department of Health Services;

SUFFOLK COUNTY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Has the Petitioner established that "compelling reasons" exist for this Court to grant the writ where he has failed to cite or discuss any of the considerations governing review on certiorari (Rule 10) in his petition and where all that he is seeking is yet another review of his termination from employment?

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STATEMENT OF THE CASE

The petitioner, Robert Carlen, M.D., is a former part-time civil service employee of the Suffolk County Department of Health Services. He worked as a physician at the Suffolk County Correctional Facility (JA30).[1]

On or about December 4, 1986, the petitioner commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (McKinney 1994) against his supervisors, David Harris, M.D., William Steibel, M.D. and Maury Greenberg, M.D., to obtain a judgment to enjoin his supervisors from interfering with his professional judgment and his professional duties in the treatment of his inmate patients. A Justice of the Supreme Court, State of New York, granted the supervisors' motion to dismiss that proceeding by order dated May 1, 1987 (A36-39).[2] Petitioner appealed and the Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed the lower court's decision finding that the petitioner failed to exhaust his administrative remedies and that the petition failed to state a cause of action. *Carlen v. Harris*, 140 A.D. 2d 288, 527 N.Y.S. 2d 538 (2d Dept. 1988), *lv. to appeal denied*, 73 N.Y. 2d 709, 540 N.Y.S. 2d 1004, 538 N.E. 2d 356 (1989) (A30-35).

Specifically, the Appellate Division stated:

Over and above this flaw in the proceeding,

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1. References preceded by "JA" are to pages in the Joint Appendix in the Court of Appeals for the Second Circuit.

2. References preceded by "A" are to pages in the Appendix before this Court.

> we are of the view that the petition fails to state a cause of action. The respondents clearly had the authority to direct the manner in which the petitioner performed his duties. The petition and the papers submitted by the petitioner in response to the respondents' motion to dismiss fail to demonstrate that the respondents exceeded their authority in any way and is therefore insufficient as a matter of law (*see McGraw v. Shapiro*, 56 A.D. 2d 624, 391 N.Y.S. 2d 681).

140 A.D. 2d at 290, 527 N.Y.S. 2d at 539 (A35).

Petitioner was terminated from employment on or about February 13, 1990, following an administrative hearing held pursuant to Section 75 of the New York Civil Service Law (McKinney 1983) (A40-41). The basis for the termination was a finding that petitioner was guilty of 46 disciplinary charges that were the subject of the administrative hearing (A42-53).

The hearing officer determined, in sum, that Petitioner deviated from accepted medical practice on eight occasions (A52), refused to provide medical care to patients on five occasions (A52) and failed to follow procedural and substantive medical orders from supervisors in twenty-eight instances (A50; A52). Most notably, with respect to five of the charges, the hearing officer noted that Petitioner's action (or inaction) may have put patients at risk (A51).

On June 4, 1990, Petitioner commenced another C.P.L.R. Article 78 proceeding in New York State Supreme Court, this time to overturn his termination. That proceeding was transferred to and heard by the Appellate Division of the Supreme Court of the State of New York, Second Department.

The Appellate Division found that there was substantial evidence to support the findings of guilt and the termination of the petitioner and that there was no support for his retaliation claim (A27-29). The court stated:

> [W]e note that we previously determined, as a matter of law, that the respondent had the authority to direct the manner in which the petitioner performed his duties, and that the petitioner's arguments set forth in the instant proceeding virtually mirror those propounded and rejected earlier (*see Carlen v. Harris,* 140 A.D. 2d 288).

Carlen v. Harris, 200 A.D. 2d 619, 620, 608 N.Y.S. 2d 851 (2d Dept. 1994), *lv. to appeal denied,* 83 N.Y. 2d 757, 615 N.Y.S. 2d 874, 639 N.E. 2d 415 (1994) (A28-29).

Petitioner commenced the instant civil rights action against the Suffolk County Department of Health Services and David Harris (hereinafter the "respondents") on January 15, 1993 (JA27). An amended complaint was served on January 19, 1993 (JA28-53). Petitioner alleged that the respondents violated the jail inmates' Eighth Amendment rights to adequate medical care and accurate medical records, and Petitioner's First Amendment right of free speech (JA31-37). Further, Petitioner claimed that the Civil Service Law § 75 disciplinary proceeding which was affirmed by the Appellate Division was a hoax which deprived him of his Fifth and Fourteenth Amendment due process rights (JA32). Petitioner sought annulment of his termination, reinstatement to his employment, compensatory and exemplary damages and an order prohibiting the respondents from continuing to deprive him and Suffolk County prisoners of their constitutional rights.

The Respondents moved to dismiss the complaint on the grounds that the Petitioner had no standing to assert the Eighth Amendment rights of inmates, that the complaint failed to state a claim under the First, Fifth and Fourteenth Amendments, and that the full faith and credit clause precluded relitigation of issues finally determined by the New York State courts. The Honorable Leonard D. Wexler, United States District Court Judge, granted the Respondents' motion. The District Court found that petitioner's due process, equal protection and First Amendment claims were barred under the doctrine of issue preclusion. The District Court further found that the Petitioner failed to state an equal protection cause of action and that he lacked standing to assert a violation of the inmates' rights to adequate medical care. While the District Court did not specifically recognize petitioner's indirect Eighth Amendment claim ("constitutional right to refuse to violate the inmates' constitutional right"), it found that the state court's finding of no retaliation precluded a finding in his favor.

The Court of Appeals for the Second Circuit affirmed the District Court in a summary order for substantially the reasons stated by the District Court (A1-A4). The Court of Appeals also denied the petition for a rehearing en banc (A5). This Petition for a Writ of Certiorari ensued.

SUMMARY OF THE ARGUMENT

There are no compelling reasons for this Court to grant further judicial review of Petitioner's disciplinary proceeding.

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO ESTABLISH JURISDICTION FOR REVIEW OF THE ORDERS APPEALED FROM, AS REQUIRED BY RULE 10 OF THIS COURT.

In *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), this Court stated that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning of provisions of federal law". In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955), this Court, in considering the meaning of the phrase "special and important reasons" within the context of the former version of Rule 10 of the Supreme Court Rules, noted that it does not sit for the "benefit of the particular litigants", and declared that the issue presented must involve a "a problem beyond the academic or the episodic." The Court stressed that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Id.* at 79, 75 S. Ct. at 620, 99 L. Ed. at __, *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923).

None of the considerations specified in Rule 10 are in any way implicated by the issues presented by this Petition. Indeed, the Petition does not even address and brief any of the considerations under Rule 10. The order appealed from does not involve a decision of a United States Court of Appeals which is "in conflict with a decision of another United States Court of

Appeals on the same important matter," nor does it involve resolution of a federal question "in a way that conflicts with a decision by a state court of last resort," nor has it "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a), Rules of the Supreme Court. This Court has settled the law pertaining to the preclusive effect of a state court judgment, and that law was correctly applied by the courts below. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75, 84-85, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 103-104, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

CONCLUSION

For all the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari from Orders of the United States Court of Appeals for the Second Circuit, dated September 26, 1996 and November 8, 1996, be denied in all respects.

Respectfully submitted,

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